

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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APR 14 2003

Federal Communications Commission  
Office of Secretary

In the Matter of	)	
	)	
Amendment of Part 2 of the Commission's	)	
Rules to Allocate Spectrum Below 3 GHz for	)	
Mobile and Fixed Services to Support the	)	ET Docket No. 00-258
Introduction of New Advanced Wireless	)	
Services, including Third Generation Wireless	)	
Systems	)	
	)	
The Establishment of Policies and Service	)	IB Docket No. 99-81
Rules for the Mobile-Satellite Service in the 2	)	
GHz Band	)	
	)	
Amendment of the U.S. Table of Frequency	)	
Allocations to Designate the 2500-2520/2670-	)	RM-9911
2690 MHz Frequency Bands for the Mobile-	)	
Satellite Service	)	
	)	
Petition for Rule Making of the Wireless	)	
Information Networks Forum Concerning the	)	RM-9498
Unlicensed Personal Communications Service	)	
	)	
Petition for Rule Making of UTStarcom, Inc.,	)	
Concerning the Unlicensed Personal	)	RM-10024
Communications Service	)	

To: The Commission

**PETITION FOR RECONSIDERATION**

Pursuant to 47 C.F.R. § 1.429, TMI Communications and Company, LP ("TMI") and TerreStar Networks Inc. ("TerreStar") hereby petition for reconsideration of the Commission's *Third Report and Order* in the above-captioned proceedings concerning Advanced Wireless Services ("AWS").<sup>1</sup> TMI previously participated in this rulemaking, and

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<sup>1</sup> *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including* (continued...)

TerreStar, a TMI affiliate, is the prospective assignee of TMI's LOI authorization to operate MSS service in the 2 GHz band.

There are several defects in the Commission's *Third Report and Order* that should be remedied on reconsideration.

*1. Distribution of Reclaimed MSS Spectrum:* TMI and TerreStar seek clarification of the method by which the MSS spectrum reclaimed in the Order is to be reallocated to currently authorized MSS licensees to avoid any prejudice to a party whose authorization is reinstated. Specifically, the Commission delegated authority to the International Bureau "to issue revised authorizations . . . when the initial milestone review is completed."<sup>2</sup> As noted below, TMI and TerreStar currently have pending an Application for Review and Request for a Stay of an International Bureau Order revoking TMI's LOI authorization in the 2 GHz band as part of the initial milestone review, and dismissing as moot an assignment of that LOI to TerreStar. On reconsideration, the Commission should clarify that the International Bureau may not reallocate reclaimed MSS spectrum among the currently authorized licensees until after disputes about the milestone process are resolved. That clarification is necessary to prevent TMI and TerreStar from being prejudiced by any reallocation that might occur before TMI's authorization is restored. Only after a revocation decision is final and not subject to further

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*Third Generation Wireless Systems; Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band; Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UTStarcom, Inc., Concerning the Unlicensed Personal Communications Service; ET Docket No. 00-258, IB Docket No. 99-81, RM-9911, RM-9498, RM-10024, FCC 03-16 (rel. Feb. 10, 2003) (published in the Federal Register March 13, 2003) ("Third Report and Order").*

<sup>2</sup> *Id.* ¶ 33.

appeal should the International Bureau be authorized to reallocate the reclaimed MSS spectrum among the currently authorized licensees.

2. *Implications for Milestone Review Process:* On reconsideration, the Commission should also confirm that the public interest reasons upon which its spectrum reallocation decision are based did not (and will not, going forward) prompt the cancellation of any outstanding 2 GHz MSS authorization for failure to meet a milestone condition. In other words, the Commission's pre-existing milestone policies for the 2 GHz MSS remain in effect, on reconsideration, even if the FCC decides to confirm its policy decision that some MSS spectrum is needed for AWS.

TMI and TerreStar have reason to be concerned about the potentially inadvertent and arguable unlawful spillover of FCC policy decisions in this docket. For example, in a recent review of TMI's initial construction milestone, a disagreement over the technical meaning of the FCC's non-contingent contract requirement was resolved by the International Bureau declaring TMI's LOI authorization null and void—despite a pending assignment application to TerreStar that would have vitiated the Bureau's **concern**.<sup>3</sup> (TMI and TerreStar have pending an Application for Review and a Request for a Stay of that **decision**.<sup>4</sup>) In ruling against TMI and TerreStar, the Bureau relied on a milestone test that was completely novel, unsupported by Commission practice in other licensing areas, and internally inconsistent with the text of the milestone requirements — **ven as** the satellite construction was proceeding at Space Station/Loral.

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<sup>3</sup> *TMI Communications and Company, Limited Partnership*, File No. 189-SAT-LOI-97, DA 03-385 (rel. Feb. 10, 2003).

<sup>4</sup> Application for Review, File No. 189-SAT-LOI-97 (filed Mar. 12, 2003).

The Commission should make clear in this proceeding that its desire to obtain more spectrum for AWS may not be used to justify new requirements or novel interpretations of the MSS milestone requirements. In particular, the Commission should advise that any decision in this docket would not justify the Bureau in applying a new or different interpretation of the Commission's milestone policy in order to free-up spectrum more quickly. Aside from being a violation of APA requirements and the Commission's rules, it also would be the height of irony for the International Bureau to cancel—through exceptional interpretations of the milestones—authorizations for satellites currently under construction in order to give spectrum to the mobile services, where the type and kind of activity undertaken by the satellite licensee would have fully met the build-out requirements.

3. ***Unjustified Decisions in the Order:*** Finally, the Commission's ***Third Report and Order*** does not provide adequate record support **for** its decision to eliminate nearly half of the MSS authorizations in the 2 GHz band because, among other things, as TMI demonstrated in its prior submissions, the demand showings made by the terrestrial wireless industry are inadequately documented.

The Commission's spectrum reallocation has also unfairly compromised the development of a competitive MSS industry. Instead of giving MSS the opportunity to be tested in the marketplace, the Commission has chosen to hobble it with a dramatically reduced allocation. It is not sufficient for the Commission to claim that it is only revoking the spectrum of the licensees that have not met their milestones—even successful operators, those meeting their milestones and otherwise playing by the rules, will be foreclosed from expanding their service if the Order is allowed to stand because the entire MSS band has been cut nearly in half. Under the Commission's Order, a 2GHz MSS carrier is completely precluded from ever having

access to 30 MHz of spectrum reallocated by the Order. This situation is not altered by the FCC's reference to the fact that other (i.e., non-2 GHz) MSS systems may have enough spectrum to support MSS growth "for the foreseeable future."<sup>5</sup>

In short, the *Third Report and Order* is entirely inconsistent with the Commission's commitment in the *Further Notice*, repeated in the Order, "that any reallocation of existing MSS spectrum would not significantly impair any of the current licensees' rights and reasonable expectations to retain its current assigned spectrum allotment and acquire additional MSS spectrum for purposes of deploying and operating a fully matured 2 GHz MSS system."<sup>6</sup> The Commission therefore should reverse the decision to reallocate nearly half of the MSS spectrum away from this promising but emerging service that has a unique ability to bring service to underserved and unserved areas.

In addition, TerreStar and TMI have reviewed the Petition for Reconsideration being filed by the Satellite Industry Association ("SIA"). As SIA points out, the Commission has failed to explain why it reallocated spectrum that is allocated globally, while leaving in place nonglobally allocated spectrum.

TMI and TerreStar seek to operate satellite services across national boundaries. The *Third Report and Order* will prevent the companies from making the most efficient use of globally available MSS spectrum because the use of some globally allocated spectrum in the United States is foreclosed by the Order. As noted by SIA, the Commission has failed to justify this reallocation, especially in light of its prior policy and decisions favoring international


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<sup>5</sup> *Third Report and Order* ¶ 31; see *id.* ¶ 31 n.92.

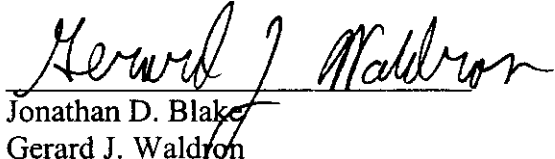
<sup>6</sup> *Amendment of Part 2 of the Commission's Rules*, 16 FCC Rcd 16,043, 16,056 (2001); accord *Third Report and Order* ¶ 14.

spectrum harmonization. In addition, the justification offered by the Commission, namely economies for new PCS entrants, does not bear scrutiny if only because the reallocated spectrum may well be used for other wireless services. The Commission's reallocation decision should be reversed or, at a minimum, modified to preserve the existing global MSS band plan (i.e., the nonglobally allocated 2010-2020 MHz band should be reallocated instead of the 1990-2000MHz band).

Respectfully submitted,

  
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